

Employment support – a normative step backward, forward or nowhere?

Sara Stendahl

The tramps called it The Mountain, the establishment where they were brought when convicted to forced labour for begging and tramping the roads. It was a hard place. A “harshfarm” in Sånga county. Apart from farming it had a stone-quarry. There, surrounded by constables, the tramps pondered about why one, but not the other, ended up in this place.

*Harry Martinsson
Vägen till Klockrike¹*

Introduction

This chapter is concerned with the normative implications of “employment support”. The concept is used as a comprehensive label to include different *legal strategies* elaborated with the aim of moving recipients of social security cash benefits from benefits into paid work.² Employment support described in this way is an essential aspect of what has been called the active welfare state or the work

¹ Martinson, 1950. The year is 1898 and the former cigar maker Bolle, betrayed in love and in disgust of what industrialisation does to humans and to craftsmanship, decides to look for freedom in tramping the countryside of Sweden. Still, fear of the authorities is ever present as vagabonding is forbidden. The penalty is a one year sentence to forced labour. Martinson was awarded the Nobel Prize in 1974.

² The concept of legal strategies is used to capture the way legal constructs (rules, principles, practices) function as building blocs in the implementation of social policies, and how the different usage and combination of these will determine different modes of governance. Legal strategies are worked out and determined on different levels – locally, nationally, regionally and internationally. Thus, although national legislation (statutory law) would be a prime example of where to look for legal constructs, this is not an exclusive source. In the area of welfare law there is increasing awareness of the pluralistic elements of legal systems and the notion of legal strategies does not exclude such a perspective. Thus, legal strategies are not always coherent, they do not necessarily point in the same direction, not even on the ideal, normative, level.

first welfare state.³ Depending on the strategy chosen, employment support measures can be designed in many different ways, and they can be targeted at different groups of welfare recipients.⁴

The aim of this chapter is twofold, the first aim is to serve as a concluding chapter reflecting upon the different contributions made to the present volume highlighting important themes. The second, interlinked, aim is to explore the normative impact of work first welfare reforms in three different European countries using the theory of *basic normative patterns*.⁵ The empirical input is limited to the nine country reports constituting chapters in the present volume. My ambition at this point is neither to draw conclusions nor to explain the normative route taken by European countries in their pursuit of work first welfare, but rather to formulate questions that could be worthwhile to pursue in future comparative legal studies.⁶ As stated by Cox, “welfare reform is more a struggle over identity of a society than over the size of the public budget”,⁷ and what is suggested in the present text is that an analysis of legal strategies could offer this sought after knowledge of the normative patterns of different societies.

The material analysed, the previous chapters, was written in response to a request asking the researchers to:

... contribute by describing and discussing legal strategies used to increase labour market participation. By legal strategies we refer to the legislator's choice of method to implement a specific policy, e.g. the creation of rights, the choice between using hard law/soft law, public/private law, statutory law/collective bargaining etc. The national analysis could thus include reflections on legal strategies for implementing activation policies for persons being sick, disabled or unemployed.

³ The concept of “work first” has mainly been used in a North American context (the US and Canada) to label welfare reforms that aim to move welfare recipients from benefits to private-sector jobs. In 1995, the Democrats introduced a Work First welfare reform bill for debate in the Senate and programs in this spirit have since then been institutionalised in the different states. The American way of activation through work first programs has become associated with “work fare”, with an emphasis on work requirements that “lack training elements and options, and that implies inferior working conditions” see Kildal, 2001. It is probably fair to say that the concept of work first is normatively biased, to the extent that it is commonly linked to a specific ideological package: “employability-based approaches to supply-side intervention in the labour market”, Peck and Theodore, 2000. The choice to use the concept here, in a European context, is a choice to underline that the implementation of what seems to be a common and fairly uncontroversial goal of “activation” is normatively impregnated.

⁴ There are at least three different types of methods to effectuate employment support: i) through the offer of active services, ii) through requirements of conditionality and iii) through economic incentives. Another categorisation of employment support use the distinction “measures to stimulate demand” and “measures to create productivity”. In the first category we find measures such as lowered levels of benefits, while an the offer of labour market education belongs to the second category, see for instance Swedish Government report ”Nya förutsättningar för arbetsmarknadsutbildning” [New conditions for labour market education], 2007.

⁵ Christensen, 2000, pp. 285-324, Stockholm.

⁶ Although this chapter is an explorative exercise, based on a limited number of texts and on observations made by a limited selection of researchers, it is an exercise that invites further reflections for comparative studies on the normative impact of work first welfare. Such a study is also in the making within the framework of the research project “Rehabilitation and the EU”, funded by FAS.

⁷ Cox, Robert Henry, 2001, p. 498. And to further underline the importance of this kind of knowledge Cox continues: “Reform proposals that do not invoke an accepted idea of legitimacy stand little chance of success, while a sense of legitimacy can facilitate truly dramatic change” (ibid).

The researchers approached were mainly legal scholars (Eischenhofer, Welti, Harris, Westerhäll and Inghammar) but also researchers with a socio-legal background (Adler and Rahilly). For the purpose of providing a scholarly framework, references are in the following also made to the work of other researchers in the field and in particular to the work of Johansson and Hvinden, as the latter contributed actively in our symposium.⁸

The question of Europeanization will not be in the forefront as I proceed. Rather than exploring the possible impact of community policies on national activation programs this text probes into the enforcement of employment support using a slightly different angle. The examples from Britain, Germany and Sweden, picked up from the previous chapters, serve as a basis for reflections on the normative challenges raised by a strong emphasis on employment support. Thus, rather than approaching the question of convergence or divergence, this chapter aims to reflect on what is at stake. If the question of Europeanization is concerned with direction, whether or not European states move in a similar manner or not or if they respond in similar ways to regional directives or not, this chapter has the ambition of illuminating some implications of these strategic choices. What are the normative challenges of a work first welfare state?⁹

Based on an analysis of laws regulating the social dimension (the social sector, working life and family life) Anna Christensen developed a theory of basic normative patterns and processes of legal change.¹⁰ The basic idea underlying her work is that the law of the social dimension reflects fundamental moral values and conceptions prevailing in society and thus that the study of law can provide access to knowledge about the normative setting of societies.¹¹ She also claimed that such basic values formed patterns of some consistency and endurance. Christensen mentions three main “basic normative patterns” in her own work and focuses on two of them: the protection of established position and the market functional pattern. The

⁸ See preface.

⁹ The present text is thus situated in a long standing tradition of welfare state writing that has the ambition to interpret the constant changes that is a characteristic of welfare policies, trying to discern consistent patterns on a more fundamental level. To explicitly frame such approach in terms of the normativity of the welfare state project is a bit more rare but has lately been done by for instance Kildal and Kuhnle, 2005.

¹⁰ Christensen, 2000. Hydén has based some of his writing on Christensen’s work, see Hydén, 2000 and more extended, 2002. I will later return to the work by Hydén.

¹¹ The theoretical and philosophical literature on the relationship between law and morality and between law and prevailing values in society, is far too extensive to connect to for the purpose of this chapter. This delimitation could arguably be defended by the fact that the aim of this text is distinctly interlinked with the implementation of welfare reforms. Legal literature combining an interest in hands-on welfare law regulation and in the relationship between law, society and basic normative values - is less abundant. Christensen’s work provides one such rare example. Still, maybe it should be emphasised, given that the UK is one of the countries discussed in this volume, the topic of the relationship between law and morality, although often problematised in civil law countries, is also under debate in common law countries, see for instance Cotterell, 2000.

third pattern – just distribution – is less developed in Christensen's work.¹² According to Christensen the different patterns either attract or repel legal regulation and in her work the patterns tend to appear in a bipolar fashion, balancing each other. Through the identification of different, coexisting clusters of values, policy reforms can be discussed in terms of how they interact with these clusters. The framework allows for a discussion of change and has explanatory value in identifying conflicts and developments that exist on a basic normative level.

In previous work I have discussed reforms of the Swedish sickness insurance using three clusters of values to describe the normative setting of potential change: *social stability*, *individual freedom* and *social equality*.¹³ Each cluster contains interacting, and possibly conflicting, conglomerates of values that are (or have been) important for the development of the Swedish welfare state.¹⁴ Values linked to *social stability* preserve status quo, support established positions and focus on those with positions to lose. It supports the idea of ownership of social positions acquired through paid work. The extent to which “the protection of established position”, through legislation in the social dimension, has marked the Swedish welfare state has been shown by Christensen. Your wage, your trade or profession becomes an established position that is protected by the welfare state. This cluster is conservative as it preserves achieved positions and it forms a hindrance to reforms and changes that challenge the present order. Values linked to *social equality*, on the other hand, are concerned with the distribution or redistribution of wealth, with solidarity and with equal respect. Redistribution in this sense is about levelling the injustices caused by differences in capabilities people should be given access to resources that to some extent – at a basic level – will compensate for original or acquired differences.¹⁵ To achieve social equality there is a need for a strong state capable of creating (re)distribution of resources and, in its prolongation, a democratic society constituted of people able to make autonomous decisions. Such a broad - participatory and democratic - approach to welfare is firmly rooted in the value cluster of *social equality*. The third cluster is values linked to *individual freedom*, favouring the rationalities of the autonomous individual as well as the market economy.¹⁶ The individual is a key actor demanding a welfare state allowing for individual choices and adaptation to specific circumstances, but also one that takes responsibility for risk-management. Compared to the value cluster favouring social stability

¹² For a study that has explored the notion of “just distribution” further, see Stendahl, 2004. See also Olson 2007, Olson has identified what he calls the “conceptual crisis” of the welfare state – “leaving the welfare state without a clear normative understanding of the goals it should be pursuing in modern society” (ibid, p.4). The answer Olson provides is “reflexive democracy”, understood as politics rooted in practices that support capability promotion, equal opportunities and participatory politics. Thus, in the terminology used in this chapter, an extrapolation of values linked to “social equality”.

¹³ Stendahl, 2004.

¹⁴ The “clusters” I use are strongly influenced by the notions of patterns introduced by Christensen, although while she looked for the normative content of patterns in legal sources only, the identification of clusters feed from a broader input. The aim is similar though, to identify shifts and movements in the moral foundation that finds its way into the construction, interpretation and practise of law.

¹⁵ Sen, 1999.

¹⁶ This cluster corresponds to some extent to Christensen's market functional pattern. To this pattern Christensen linked the concept ownership, the freedom of association and the freedom to enter agreements.

these are values promoting dynamic shifts and social positions are no longer status positions (to be owned and protected) but rather understood as changeable, flexible, contractual positions.

Hydén uses Christensen's theory as a platform for discussing normative movements over time.¹⁷ According to Hydén, increased or decreased strength in the way that the normative patterns work their way in law could be signs of a dialectic development leading towards paradigmatic changes. Thus, Hydén argues that the protection of established position is likely to be strong in certain periods of time, until pressure for change grows too strong and other values, less conservative, are prioritised. Still, in the new phase other positions will be considered established and worthy of protection and so there will be a shift again. This analysis underlines the bipolar character of the normative field, a bipolar situation where basic values remain fairly intact but where emphasis and context change as societies develop. Hydén describes a continuing historical flow where different types of societies grow and decline in what he illustrates through the use of S-curves. In transition periods, where one type of society is in decline and the new society has not yet matured, there will be less protection of established positions.

In addition to the rise and decline of protection of established position Hydén identifies a number of other cyclic changes in law depending on the maturity of societies. Thus, Hydén claims that in periods of change law will become more formal, more individualistic and more repressive, while the need for repressive law diminishes in a mature society, in favour of substantive justice. Hydén writes:

If we apply the reasoning on legal changes, in the form of movements between bipolar points in the normative field, we would find ourselves today at a point in time heading towards a new phase of increased repressive elements /.../ Apart from the fact that a change of social system in itself means a shift of social codes and thus shifting assessments of what is right and wrong between those who base their assessments on the normative pattern from the old society and those who use the normativity of the new developing society, it is today it is about globalisation and all that it carries with it in terms of influences from different directions.¹⁸

In my conclusion I will return to the normative clusters introduced above as a way to structure my reflections on national responses to activation policies.

The modern notion of employment support and the old fear of idleness

The notion of employment support, or activation, is interesting as it simultaneously reflects conceptions that are deeply rooted in the historic legacy of different states of Europe, yet seems to contain elements that are distinctly challenging to the welfare models as we know them.

¹⁷ Hydén, 2000, 2002.

¹⁸ Hydén, 2000, p. 153 f. Translation to English made by author.

All three countries in focus share a tradition of fear of idleness. The social security models worked out in Sweden, Germany and Britain are all based on a demarcation between the deserving and the undeserving.¹⁹ What is characteristic of the undeserving could be understood as a position of self-inflicted poverty, a choice of not working to the best of one's ability. The fear of encouraging the idle or the malingers has provided social security systems with elaborated regulations and tests to secure that benefits do not support what is conceived of as deviant behaviour. The economic relief provided through social security has in these countries not been conceptualised as charity given to all poor or needy, but as a right that somehow has to be earned. The individual citizen earns a moral right to become a beneficiary through fulfilling the obligation to work towards becoming self-supporting. Against this background the strong impact of a new policy of activation is understandable. It rolls along smoothly on an already paved road.

Still, the different reforms launched during the past decade, be it the German Hartz-reform, the British Welfare to Work programs or the Swedish efforts to create efficient work-focused rehabilitation, all contain elements that raise the question of shift or change on a more fundamental level. What is the role of the state in the work first welfare state? And how should the rights and obligations of citizens be characterised in this new setting? It seems as if the activation agenda, if pursued strictly, also leads to new crossroads.

The academic debate on whether or not European welfare states are facing a paradigmatic shift has been quite vivid at least since the beginning of the 1990s and the economic downturn of that decade. The response to the "new crisis" of the 1990s was discussed in terms such as dismantling and retrenchment,²⁰ but as the decade came to an end, and the economy stabilised, conclusions also pointed at persistence.²¹ Although there were also sceptics, more gloomy in their assessment of the future warning about a creeping disentanglement that would lead to increased poverty over time,²² the welfare state as we knew it seemed to have survived.²³

One of the responses to the crisis of the 1990s was an increased emphasis on activation, and also, as one aspect of the implementation of the active welfare state – on employment support. The looming discomfort that the present mode of activation policies seem to feed, not least among academics, could at least partly be explained through the distinctions made between workfare and welfare, as well as the distinction between de- and re-commodification.²⁴

Workfare is, according to Kildal, a quite distinct form of activation policies originating in the US.²⁵ The concept became popular during the 1990s, and in the

¹⁹ See the chapters by Neville Harris and Eberhard Eichenhofer in this collection.

²⁰ Kautto (et al.) 1999, p. 5 f. with a reference made to Pierson, 1994.

²¹ van Kersbergen, 2000, p. 20 f., see also Kautto (et al.) 1999, p. 7.

²² van Kersbergen, 2000, p. 28.

²³ See for instance Kauto (et al.) eds. 1999, p. 7.

²⁴ Examples of concerned writing that use these concepts in their analysis of the ongoing changes of the welfare state are Dingelday 2007, Handler 2004, and Ryner 2002.

²⁵ Kildal, 2001.

process less distinct, but in an effort to distinguish again a more precise content Kildal defines workfare programs with the help of four criteria: “Workfare programs 1) oblige able-bodied recipients 2) to work in return for their benefits 3) on terms inferior to comparative work in the labour market, and 4) are essentially linked to the lowest tier of public income maintenance systems.”²⁶ Apart from workfare policies, Kildal also identifies two other types of activation policies: active labour market policies and welfare to work policies. The workfare option differs from the other two by a lack of training elements as well as lack of options for the individual.²⁷ It seems as if the categorisation used by Kildal is based on two main variables: one concerns the inclusion or exclusion of training and education aspects within the programs: the other focuses on the autonomy of the welfare recipient and on the possible mix of rights and obligations bestowed upon them.

The concept of de-commodification has been widely spread as it was used by Esping-Andersen as a way to distinguish what he identified as a strong characteristic of the social-democratic welfare regime.²⁸ The concept has been defined in terms of “the extent to which individuals and families can uphold a normal and socially accepted standard of living regardless of their performance on the labour market.”²⁹ A de-commodifying welfare state provides the individual with a relative freedom as an actor in the labour market: “citizens can freely and without potential loss of job, income, or general welfare opt out of work when they themselves consider it necessary.”³⁰ Thus, a de-commodifying strategy functions in way that empowers the individual (through providing an opt-out choice) at the same time as it puts pressure on the supply-side of the labour market to offer positions that are attractive to potential employees. The 1990s crisis, the tightening of benefits, along with a growing interest in activation made way for analyses that challenged the alleged de-commodifying attributes of the social-democratic welfare regime and underlined the re-commodifying function.³¹ Thus, the state no longer offered an opt-out position, but a temporary solution, facilitating transfer from one social position to another, expecting individuals to adapt, re-train, rehabilitate and re-educate themselves.

This fear of an ongoing paradigmatic shift, that would lead to a dystopian two thirds society, was raised by researchers during the crisis years, but as the economy turned, employment figures rose, and activation policies strengthened their position in the social security systems, the message somehow appeared less alarming.

²⁶ Kildal, 2001, p. 3.

²⁷ Kildal, 2001, p. 4. See also Dingelday who makes a distinction between workfare policies and enabling policies where workfare stand for the negative aspects of activation ambitions (an emphasis on obligations, conditionality, pressure and even compulsion) while enabling policies stand for the positive aspect (expansion of individualised services in order to improve employability). She also concludes, based on a comparative study, that different welfare state types contain both kind of policies, although mixed differently. Dingelday, 2007, p. 823 f.

²⁸ Esping-Andersen, 1990.

²⁹ Lindqvist, 1987, p.12.

³⁰ Drøpping, et al., 1999, p. 157.

³¹ Ryner, 2002.

Maybe now it is time to reflect again on where we are heading.³² Considering the long history of shunning idleness in the countries in focus one might wonder if activation policies are best understood as a step backwards, a return to the normative roots or the result of a circular movement? Or do they indicate a direction forward, towards a new interpretation of welfare? Or are maybe things more or less the same because activation policies mean nothing in terms of a deep set change but are more to be understood as rumblings on the surface?

In the previous chapters scholars from Germany, Britain and Sweden bring forward their reflections on activation policies and measures of employment support from a national perspective. To me they seem to raise a number of themes and issues related to the questions asked above.

One clear and common feature linked to the introduction of activation policies in all three countries is an increased pressure on *new groups* that are expected to be at the disposal of the labour market. While pressure traditionally, in all three countries, has been quite distinct and harsh on those categorised as unemployed, we now see an increased focus on the sick and disabled (in Sweden and the UK), on lone parents (the UK), and on the older part of the workforce (Sweden and Germany). The issue of employability, given whatever hindrances there might be in the individual case, is the main target.

A second theme concerns the *driving forces behind the behaviour of benefit recipients* that somehow lingers below the different policy reforms aimed to “make work pay”. In all countries, and certainly in Sweden and in Britain, the methods used to fight idleness are based on a conception of recipients as potential cheats (and resources are made available to scrutinise and survey the behaviour of citizens). Sanctions of different kinds are common (for instance benefits are made conditional on active participation in different programs). It appears to be acceptable to base arguments on the assumption that people avoid work if possible, and to create policies that make it less attractive, less possible, to be outside the labour market. There is also, as one side of the moral pressure interwoven with the ideology of activation, a moral failure to be carried by those who in the end do not find a way to secure their own subsistence through work on the open labour market.

A third theme that the topic of employment support raises is the role of law as a method of governance in the work-first welfare state. Does the implementation of reforms lead to a welfare state where law is more or less prominent? Some arguments could be made for a development of a more legal rights-based approach to social security, but again, arguments could also be made for claiming that administrative discretion has increased. Do we see a process of juridification in the social sphere linked to a process of individualisation? Or, is the main strategy for imple-

³² In an article published in 2008 Taylor-Gooby contributes to this discussion by claiming that we are heading towards a new welfare settlement (after a period of uncertainty). Still in spite of the shared vision of an active welfare state, the character of this new settlement is still in the making and according to his study states seems to prefer “negative activation” to the detriment of “positive activation” (deregulation and restrictions rather than investments in programs to increase skills and safeguard social mobility). Taylor-Gooby, 2008.

menting the work first welfare state to move out of law? Below these themes will be further elaborated and discussed.

New groups targeted (new conception of risk developed?)

It used to be that a number of social risks excused those subjected to them from the obligation to work and support themselves. Examples of such risks were sickness, disability and the assumption of care responsibilities. The content of the protection provided by social insurance, the risk insured against, was perceived as an economic back-up for individuals who had legitimate reasons to withdraw from the labour market.

As the work-first welfare state develops one of its most obvious characteristics is the diminishing scope for legitimate opt-out of paid work. Where prevailing conceptions would previously have excused those with impaired health, older or those responsible for the care of small children or disabled relatives, from the obligation to work in the labour market, it seems now as if concern for these groups is translated from the opt-out solution into efforts to increase their employability, discarding opt-out as a solution. In Germany recent reforms have included a new definition of “ability to work” and according to Welti the new definition “declares a lot of even severely disabled people able to work”.³³ It has been estimated that as many as 25 per cent of the German unemployed have limiting health problems.³⁴ Hvinden and Johansson have made similar observations³⁵ and also Rahilly, Adler and Harris provide examples of how activation policies have had the result of expanding the obligation to work to new groups.

What is happening is thus to some extent a process of redefinition. That unemployed citizens have a duty to be active is well established, what is new is who is included in the definition of being unemployed. From Britain, Rahilly reports how demands faced by unemployed claimants have progressively been introduced for new groups.

*Whilst unemployed claimants have always been required to be available for work, it is only in the last decade or so that the labour market conditions required of this group have been considerably extended. Benefit conditions are now also being progressively introduced for other claimants of working age.*³⁶

³³ Welti, p 146, above.

³⁴ Welti: “In 2002 the Federal Agency had found out that one quarter of all unemployed were limited by health condition. It can be taken for granted that those who came out of the social welfare system were even worse off in their health status.” p 146, above.

³⁵ Johansson and Hvinden write, “However, while the Nordic governments originally had portrayed the male working class as the primary target for active labour market policies, the activation programs introduced after 1990 explicitly embraced a broad range of groups: men and women, people with impairments, single mothers, immigrants and young people with low qualifications. Hence all unemployed Nordic citizens receiving social benefits now have a general duty to be ‘active’ according to the interpretation that the public authorities give the term.” See, IJSSP, Vol. 27, No. 7/8, 2007, p. 340.

³⁶ Rahilly, p. 79, above.

Adler points to the fact that in order to make life as a lone parent less attractive, benefits have been lowered and lone parents encouraged to "... take work, live with relatives or find a new partner".³⁷ Also Harris identifies the questioning of the right of non-working lone parents to be exempted from the work-search requirement as part of a new approach: "there is growing pressure to shift the boundary so that more claimants are subjected to a JSA [Job Seekers Allowance]- type regime."³⁸

While poverty used to be the ultimate social risk, what is most shunned in the work-first welfare state seems to be a state of worklessness. While the risk of poverty could be avoided through distribution and redistribution of resources, lack of work, reframed as a risk of social exclusion, can only be avoided through individual participation in the labour market.³⁹

As a way to make paid work a more attractive lifestyle choice, compared to dependency on state benefits, benefits are lowered, sanctions implemented and work ethics strongly promoted. All three British contributions report a risk of increased poverty and social stigmatisation for groups previously protected by the welfare state. Adler fears stigmatisation of people on benefit.⁴⁰ Rahilly puts out a warning: "Many of these work activation provisions are supported by sanctions and therefore have the potential to further intensify the poverty of the benefit claimant."⁴¹ Harris writes:

*There was evidence that sanctions had caused hardship, since many claimants had already been struggling on the rate of benefit they received. The reported that their children often lost out, as pocket money or treats were denied. Some had become indebted to friends or family, who would need to be repaid out of future benefit. Stress and anxiety had been exacerbated.*⁴²

As the traditional conception of social risks is subordinated the new work ethic, there is also a trend towards creating new organisational structures, so called "one-stop-shops" or, at least, an emphasis on coordination and cooperation. In Britain as well as in Germany such reforms could be noted.⁴³ Although Sweden has so far not followed this trend, at least not on a national scale, Johansson and Hvinden make clear that in a Nordic perspective this kind of change on an institutional level is well represented.⁴⁴ As common entrances, in a physical sense, are created the distinction between the sick, the disabled, the lone parents, the older or youngsters is

³⁷ Adler, p. 103, above.

³⁸ Harris, p. 69, above.

³⁹ See for instance Erhag in this collection.

⁴⁰ Adler, p. 107, above.

⁴¹ Rahilly, p. 79, above.

⁴² Harris, p. 66, above.

⁴³ Welti: "So for example after an application for sickness allowance the sickness insurance has to examine not only if medical rehabilitation as a benefit in kind from itself or from the pension insurance should be given but also if vocational rehabilitation from the pension insurance or from the federal agency could be successful. On the other side the federal agency has to take in account medical rehabilitation, if disabled people apply for job-seekers allowance. This would be some kind of revolutionary for the strictly segmented German system of welfare." See p. 149, above. See also Eichenhofer, p. 132 f., above.

⁴⁴ Johansson and Hvinden, IJSSP, Vol. 27, No. 7/8, 2007, p. 343 f.

diminishing. Access to state benefits is available only to those willing to knock on the door to the world of activation, once inside there are different kinds of, more or less, individualised services created in order to help each and everyone to overcome the obstacles that create hindrances to labour market participation.

Benefit recipients - active and responsible or idle and in need of “responsibilization”

Another strong and recurring theme in the chapters to follow, and maybe especially in the chapters concerned with Britain and Sweden, is the ambiguous image of the benefit recipient that several authors comment on. At one and the same time there are programs built on the notion of an active individual, participating in a cooperative process together with the authorities towards a shared goal of increased employability, but there are also frequent descriptions of practices that reflect harsh, authoritarian procedures where individuals are penalised for not accepting the activation agenda laid down by the administration.

From a Nordic perspective Westerhäll is in this context concerned with the integrity of individuals pushed into different measures with no real option to decline.⁴⁵ Westerhäll finds examples of this kind of practices in sickness insurance and Johansson and Hvinden broaden the scope to also include practices linked to the distribution of unemployment insurance and social assistance.⁴⁶

It seems as if below a surface level of correctness, where the tone is more respectful, the notion of the unwilling, idle, benefit recipient lingers as strongly as ever. In social policies words such as “user-participation”, “co-determination” and “choice” are used frequently along with the introduction of a notion of a contract. Recipients and the authorities agree and sign a contract, a plan, where recipients put their names under a commitment to be active in their search for work. Still, the freedom to choose, embedded in the notion of the contract, might from an individual perspective appear to be non-existent, as access to cash benefits is made conditional on participation.⁴⁷

From a British perspective a similar trend is emphasised by all three authors. Harris makes a connection between an image from the old days where unemployment was a moral failure to present times where being in unemployed is a personal

⁴⁵ Westerhäll: “The rehabilitative measures suggested by, for example, the social insurance office or the employer are not infrequently of such a kind as to be seen as an infringement of integrity, if they are contrary to the individual’s wishes.”

⁴⁶ Johansson and Hvinden, *IJSSP*, Vol. 27, No. 7/8, 2007. Giertz claim (on the basis of a study on Social Assistance and Activation programs in Sweden) that activation policies for the poor would more clearly brake with the old tradition of workhouses if the unemployment insurance became more inclusive (not excluding those now on social assistance (Giertz, 2004). Thus there seem to be clear empirical indications that the present system of activation differentiate between categories of unemployed, and for those at largest risk for marginalisation and social exclusion elements of “responsibilization” increases and employment support measures become more workfare-like.

⁴⁷ On the process of creating individual action plans, see for instance Hvinden and Johansson, 2007b, p. 217.

responsibility.⁴⁸ As welfare systems are increasingly guided by a method of governance described by Harris as “managerialistic”, we have seen an increased use of contractual arrangements and control measures.⁴⁹ In Britain this is a development not too far from the Beveridgian heritage, “...in exploring ways in which work incentives might be maintained, Beveridge proposed not only the maintenance of a gap between basic benefits and wages, but also discouragement of idleness through benefit sanctions /.../ and requirements to attend courses of training as a condition of receipt of benefit.”⁵⁰ That sanctions, in line with a long tradition, is widely used in the British interpretation of a work-first welfare state is noted by Harris, along with reflections on the efficiency of this strategy.⁵¹

The impression that there is a mismatch between the setting of the stage and what is actually performed is strengthened by the reflections made by Harris:

*The contractual element reflected in the notion of “agreement” implies mutuality and voluntariness, but the jobseeker’s agreement is very one-sided. As Lundy argues, “The official’s hand which shakes on this agreement is truly a hand of velvet masking a fist of steel, since failure to sign up to the agreement will result in the claimant being denied benefit”. Entry into an agreement can, in this regard, be seen as part of the process of “responsibilization”, involving state governance of behaviour intended to make people behave as “responsible” citizens.*⁵²

As legal rights to benefits are made conditional and sanctioned, the strength of having “legal social rights” is deteriorating.⁵³ There is a right to benefits, but it cannot be claimed. Both Harris and Adler voice a fear that as “activity” as such is made the prime target, quality of work is not safeguarded. In some cases this means that instead of an expected right to benefit the insured will have a duty to work in “in low status, low income employment.”⁵⁴

The question put at the beginning, asking whether employment support is a step backwards or forward, is based on the recognition of a long history of acknowledging the primacy of work, but there may also be something in the present methods, in the mix of sticks and carrots, and where sticks tend to outnumber the carrots, that provide some resemblance to a long-gone period of Poor Laws. Or maybe it is in

⁴⁸ Harris, p. 50, above.

⁴⁹ Harris, p. 50, above. This is also a trend noted by Eichenhofer who writes in positive manner about the increased scope of discretion in the administration and a shift from an authoritarian and bureaucratic tradition to a more managerial approach, see p. 139, above..

⁵⁰ Harris, p. 53, above.

⁵¹ Harris, p. 63 f. and p. 71 f., above.

⁵² Harris, p. 62, above, with a quotation from Lundy, L. 2000, ‘From Welfare to Work? Social Security and Unemployment’, in Harris, N., *Social Security Law in Context*, Oxford: Oxford University Press, p 304, and a reference to Ican, S and Basok, T, ‘Community Government: Voluntary Agencies, Social Justice, and the Responsibilization of Citizens’, 2004, 8 *Citizenship Studies* pp 130-133.

⁵³ Westerhäll: Despite the fact that the person is entitled to financial compensation under the sickness insurance scheme following the customary assessment of sickness and incapacity for work, the financial benefit is withdrawn on the grounds that the insured person is not meeting the requirements laid down for “active participation”. In here lies the element of sanction. See p. 169, above.

⁵⁴ Rahilly, p. 90, above.

the moral undercurrents of the argument to invest in methods to expose cheaters and to increase efforts to change an alleged culture of benefit dependency.

The primary role of the state in the workfirst welfare state is to facilitate transfer from periods of unemployment back in to employment. Some of the strategies evolved for this purpose aim to create incentives, to make work pay, to make it hard not to be working. As Eichenhofer writes in his description of the German reforms: “The benefit should not pamper the recipient to stay unemployed, but be frugal enough to give an incentive to take on also badly paid work.”⁵⁵ For those discarded by the market, living conditions tend to become harsh. For those traditionally defined as unemployed this tends to always have been the truth, but in the work-first welfare state all should work to the best of their capacity.

There seems to be some differentiation, based on social risk, on the use of sanctions. Thus, how severe the demand for activation is, how forceful the emphasis on obligatory participation, is made dependant of the cause for non-participation on the labour market.

There is an inbuilt dilemma in the pursuit of strategies for the implementation of work-first welfare that morally, legally and economically are to the disadvantage of those in most need. The moral blame falls hard on the individual, failing, not wanted by the market and penalised by the state (in order to ascertain that staying out of work is not an option). The dilemma is that while work (for as many as possible) is a way to combat poverty and social exclusion, the implementation, if not attentive to the needs of those discarded by the market carries the risk of creating a new group of welfare state outcasts – the unemployable.

The role of law, the role of the state

The third theme to be picked up from the selection of texts in this volume has already been touched upon, but could be explored further. There are indications that law, at one and the same time, is becoming both *more* and *less* important as a regulator in the field of social protection, as activation makes its way. Arguments can be raised for both increased and decreased juridification.

It could be argued that the emphasis on implementing non-discrimination legislation to safeguard the position of the disabled in the labour market is an example of how a legal approach is relied upon. Individuals are granted a claimable legal right not to be discriminated against and employers are, in addition, given a duty to make reasonable accommodations at the place of work. Thus, as individuals with a disability are expected by the social protection system to be active in the labour market, legal rights are bestowed upon them in order to deter employers from discriminating behaviour that would exclude the success of such a strategy. Still, the chapters written by Inghammar and Welti, in which the situation of the disabled is in focus, cast some doubt on the real strength of this approach. As emphasised by

⁵⁵ Eichenhofer, p. 135, above.

Welti, in order to reach the goal of non-discrimination towards the disabled, there is need for positive action in order to even out possible effects of disability status:

*The items mentioned especially for non-discrimination in the European and national law are not equal in function and impact. Regarding equality of sex, race, colour, language or religion in most cases we call the state as well as the actors in society to be like the goddess of justice with a blindfold on: just to ignore prejudice regarding these special topics. Regarding the equality of disabled people, in many cases we want the goddess of justice to be the goddess of equity and to have a good look at the special conditions people are living and suffering with. The concept of considering disability in equality means not a formal equality of rules but a material equality of chances and even of results.*⁵⁶

What is needed is thus not only the avoidance of discrimination but efforts, investments, resources, to even out the effect of the hindrances to labour market participation that exist as a consequence of a disability situation. According to Inghammar, the non-discrimination regulation does not really provide for such claims from the perspective of a majority of the disabled, and to a large extent those with more severe hindrances are in reality excluded from the protection provided by law:

*Disability discrimination law as we have seen it develop in Europe over the past 10-15 years has been described as elitist, de facto focusing on the most competitive disabled employees and job-applicants, leaving, I would say, a majority of persons with disabilities with no increased prospect of labour market integration.*⁵⁷

According to Inghammar anti-discrimination law in itself is thus not the legal instrument that makes a difference for these groups, except for the one positive obligation put on employers, namely the duty to make reasonable adaptations. This legal right of the disabled, and duty of the employer, can, depending on how it is implemented, make a difference in individual cases where rights are claimed.

In the chapters by Westerhäll and Adler, the scope of law is again a theme of its own. As work-first policies are implemented, there is an increased sphere of services provided by authorities created in order to support employability. While cash-benefits in most cases are legally secured through distinct legislation and with corresponding rights to appeal for individuals, the existence of rights in the new sphere of services is less prominent. Westerhäll writes about the concept of “a right to a possibility” introduced in Swedish legislation and Adler notes the increased sphere of administrative discretion in the British setting:

⁵⁶ Welti, p. 151, above.

⁵⁷ Inghammar, p. 158, above, with a reference to Inghammar, *Discrimination of People with Disabilities*, in Numhauser-Henning (ed) *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer Law International, The Hague, 2001, p. 348.

*What is meant by “possibility”? There is no explanation in the legislative material for the choice in the formulation of the Act of the word “possibility” for what is available to the individual. In ordinary language the term “possibility” is taken to mean “an opportunity/a chance”. The concept is then seen almost as a situation that arises at random without the influence of the individual. But the legal meaning of the term “possibility” has to be seen as vague. It is difficult to determine from the term alone what the legislator intended.*⁵⁸

Westerhäll points to the possible disadvantages of letting activation policies be implemented through the discretionary practises of local social security officers and questions the selection processes claiming there are discriminating practices.⁵⁹

It seems as if there is in all countries a growing “individualisation of the relationship between the state and the unemployed citizen”⁶⁰ and although juridification, through the exploration of individual legal rights, tends to contribute to such developments, it seems as if there is no simple conclusion that the legal position of individuals in the work-first welfare state has been strengthened. At least not in general.

As has been noted above, there is in the three countries a long history of making distinctions between the deserving and the non-deserving. These processes of demarcation, used to identify who are legitimate beneficiaries and who are not, are surrounded by more or less detailed legal safeguards. As the effects of the administrative decision-making, exclusion or inclusion in the social security schemes, have a major impact on the life conditions of the individual, the guarantee of making decisions legitimate has often included an element of juridification. Often what has been at stake has been some kind of cash benefit, a replacement or compensation for loss of income. Decisions on entitlement to cash-benefits are in all countries defined as conditional rights. If requirements are met, the individual has legally based rights to benefits, and decisions can be challenged. There is a possibility of redress.

Still, as concluded by Adler, it seems as if along with an increased emphasis on active interventions the possibility of redress has become substantially weakened⁶¹. To effectuate the ambitions of the work-first welfare state, new programs, new actors, new institutional arrangements have been created. The payment of cash benefits is not at the heart of the work-first conceptualisation of welfare, at its heart we find different interpretations of activation. There are differences, of course, between the different mixes and designs of employment support elaborated in Germany, Britain and Sweden, but there are also common tendencies. For those

⁵⁸ Westerhäll, p. 166, above, with a reference to Government bill 1990/1991:141 and SOU (Swedish Government Official Report) 1988:4 and Nationalencyklopedins ordbok, andra bandet [National Encyclopedia Dictionary, Volume Two], bokförlaget Bra Böcker 1996

⁵⁹ Westerhäll In practice it has turned out that many of those who need some form of rehabilitation do not obtain it. It has been possible to ascertain that factors such as which officer the insured person encounters and the individual's own attitude are crucial to whether attempts to rehabilitate will be made or not, and to how successful these will be. Surveys also show that the type of measure offered depends on such factors as gender, age, place of residence, and occupation. See p. 160, above.

⁶⁰ Harris, p. 50, above

⁶¹ Adler, p. 126, above.

deemed to benefit there is an increasing range of services offered (educational programs, professional or social skills programs, training opportunities and so forth), there is also an effort to provide more individualised support – as exemplified by the personal advisor in the British system. There is also, at least in Sweden and Britain, a tendency to increased local variations, programs may be launched in selected regions or local authorities may be given the responsibility to work out programs that respond to the specific needs of a very local labour market.

While cash benefits are usually legally embedded and secured, the same cannot be said about the wide variety of services that are a vital part of the work-first welfare state. The decision about who is to benefit from these investments in re-education and skills training is mainly within the discretion of the local officer. The lack of national homogeneity in the implementation of activation underlines this sense of de-juridification. There seem to be indications, noted by several of the authors in this volume, that the legal scope is diminishing in the effectuation of the work-first welfare state.

Conclusion

The question asked in the title of this chapter is concerned with normative developments. Will the choices made to implement the work-first welfare state cause tensions between different sets of core values embedded in the welfare state project? If Anna Christensen's notion of basic normative patterns is imposed on the different themes brought to the fore above, a couple of different scenarios appear.

A first impression is that the implementation of work-first welfare distinctly provokes the bipolar tension between the protection of established position and a more market functional approach. Through the implementation of policies that change our conception of who is unemployed, in a direction that entails an obligation on more individuals to change profession, occupation, place of residence, level of income etc. in a process of (re)gaining a position in the labour market, the protection of established position is deteriorating. At the same time responsibility for self-support is individualised, rights and obligations are made contractual, sanctions are harsh and the role of the state is becoming increasingly preoccupied with surveillance. All in all it seems as if the predictions made by Hydén are being fulfilled. In that case what is at stake is a transition, a paradigmatic shift, from one type of society to another. In Hydén's words, the welfare state of the industrial society is reformed in order to accommodate to the demands of information society.⁶²

A possible objection to the seemingly obvious fact that the protection of established position is becoming weaker in the work-first welfare state, is that it is not clear if the demands for re-adaptation hit everyone in an equal manner. Policies and regulations are formulated in a neutral way but are the well-to-do, the middle-class, the university educated, facing the same demand for re-adaptation and flexibility as

⁶² Hydén, 2000, 2002

those in blue-collar work? It seems as if in order to speak of a paradigmatic shift – of a normative step forward to something new – the overall impact of work-first policies needs to be determined. The answer is not provided here but seems to be important in order to understand the normative impact of employment support. If there are exceptions, in practice, from the re-conceptualised obligation to work, then it could be argued that the protection of some established positions has increased at the expense of others. This is not a new society, just an extrapolation of already existing differences that can be understood as rescue project in defence of social stability. The cost is increased social inequality.

There are other possible interpretations that could be supported by the different chapters in the present book. In order to discuss them I would like to shift from the bipolar analysis of Christensen and Hydén and return to the three clusters of values *social stability*, *social equality* and *individual freedom*.⁶³

In a Swedish setting, different legal strategies within the field of social security law have created a tradition of strong protection for *established position*, in combination with an extensive and fairly generous universal system responsive to demands of *social equality*.⁶⁴ Somehow, the redistributive state, providing basic social protection for all citizens, made the conservatism linked to policies securing social stability possible. If what we witness is a development that favours the dynamics of a market economy more than the stability of the status quo, the question remains, what happens to the values linked to *social equality*?

The demarcation made by Kildal between employment support measures defined as workfare, welfare to work measures or active labour market policies is one indication that the normative challenge for the active welfare state is visible in the capacity of the state to secure redistribution of capabilities.⁶⁵ From a reading of the texts included in this volume it would seem that some of the core tensions in present reform policies circle around this issue.

The three themes discussed in the present chapter all raise questions that could be discussed within the framework of a theory of normative patterns. The first theme was concerned with a notion that social risks, as they are usually conceptualised, are being reframed. In law this development is visible as changes in the construction and interpretation of the legal criteria used to control entry into different social security schemes. As different cash benefits tend to be linked to a mix of rights and obligations, the elaboration of the criteria that regulate access is at the core. Choices of legal strategies in this field have, as has been stated, a clear impact on whether the system as such protects stability and status quo on the one hand or the promotion of re-adaptation and re-education on the other. Still, both positions could be enforced with more or less concern for *social equality*. In law, concern for *social equality* can be looked for in efforts made to safeguard individual autonomy as well as in positive actions created to diminish differences in capabilities.

⁶³ See above p. 174.

⁶⁵ Kildal, 2001. See also Taylor-Gooby, 2008.

The second theme was based on the identification of a tendency to effectuate the implementation of activation policies through different disciplinary measures. In law such developments are identifiable, for instance, in constructions that allow for sanctions and where access to what is labelled legal rights is linked to more or less far-reaching obligations. To the extent that this is a pattern that, in reality, has the effect that state administrations deliver non-negotiable dictates leaving little room for individual choice or participation in decisions regarding activation measures, this pattern is quite contrary to values linked to individual freedom and to social equality. There is also, as noted above, a concern that the character of activation policies differs between groups and that the risk of being the target of responsabilization processes is not equally distributed among benefit recipients. To the extent that employment support measures similar to workfare are provided mainly to those furthest away from the labour market, this could lead to a segmentation of present systems rather than the opposite.

The third theme was concerned with the role of law and the role of the state and one reflection made was that in implementing activation policies the scope of law may be strengthened and weakened at the same time. To have legally protected rights, and access to means to enforce them, is evidently something that strengthens the individual in case of a conflict with the administration. In this respect strong legal rights can be a means to safeguard the autonomy of the benefit recipient. Still, if what is strived for is individualised solutions, specific to both person and local environment, detailed regulation could be a hindrance. In this respect, given that administrative practices are non-discriminating and include positive action, lack of detailed regulations could make the system less rigid, more dynamic, and more able to respond to individual needs. It could also be argued that reliance on individual legal rights as a means to secure the quality of decisions made in the administration of social security is to hand over to individuals a responsibility that could be more efficiently dealt with by other means (less burdensome for the individual). This said, it should also be emphasised that without distinct legal backing, individuals who feel abused by the system have small chances to challenge decisions made. Thus, knowledge about the scope of law, clarifying if law is constructed in ways that provide individuals with tools to claim their rights or if such constructions are lacking, provide essential information on normative preferences.

Based on the assumption that law offers an opportunity to study the underlying normative structures of society, Anna Christensen's theory constitutes a promising point of departure for comparative studies on normative change. Following the reasoning above it can be concluded that a legal study of the normative implications of work-first welfare can be found in the regulations surrounding employment support. In order to respond to the three clusters of values referred to above as social stability, social equality and individual freedom, such a study should pay attention to choices of legal strategies that have an impact on ownership, individual autonomy, legal rights, legal obligations and access to justice.

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